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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12 JEFFREY LEISHMAN,) No. 05-63272-fra13
13 Debtor.) MEMORANDUM OPINION

14 BACKGROUND

15 The Debtor was married for 21 years to Mary E. Leishman. The
16 marriage was terminated by a decree of dissolution entered by the Circuit
17 Court in Lane County, Oregon, in March 1998. Through the ups and downs
18 of their economic lives, each of the parties, at various times, assumed
19 the role of principal breadwinner. However, by the time the marriage
20 ended, Mr. Leishman had his own business and was the principal earner.

21 The parties negotiated a settlement of their differences which
22 took the form of a stipulated judgment of dissolution of marriage entered
23 by the Circuit Court on May 13, 1998. After the petition for dissolution
24 had been filed, the Circuit Court awarded temporary spousal support in

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1 the sum of \$650 per month. Ms. Leishman wanted the final judgment to
2 provide for permanent spousal support. Mr. Leishman opposed the idea.¹

3 The judgment itself contained the following pertinent
4 provisions:

5 8. Spousal Support. Neither party shall pay spousal
6 support to the other and a judgment in lieu of spousal
7 support is awarded to Respondent as described below in
8 paragraph 9.

9 9. Equalizing Judgment. Judgment is hereby entered in
10 favor of Respondent [Mary Leishman] and against
11 Petitioner [Jeffrey Leishman] in the amount of
12 \$52,500. This Judgment reflects an unequal division
13 of personal property as well as a lump sum
14 contribution to Respondent in lieu of spousal support.
15 The amount of the Judgment is based, in part, on the
16 value of the income and non-income producing assets
17 awarded to Petitioner, the long term marriage between
18 the parties, and the current earning disparities as
19 reported by the parties.

20 Beginning June 1, 1998, and on the first day of each
21 month thereafter, Petitioner shall pay \$500 per month
22 to Respondent as payment towards this Judgment until
23 November 1, 1998, at which time the entire Judgment
24 shall be due and payable. The Judgment shall bear
25 interest at nine percent (9%) per annum, simple
26 statutory interest, from May 1, 1998 until paid,
unless the full Judgment is paid on or before November
1, 1998 in which event all interest shall be waived.

Notwithstanding the foregoing, if Petitioner pays
\$10,000 to Respondent on the Judgment between now and
5:00 p.m. May 31, 1998, the Judgment shall be
discounted by \$3,000.

13. Businesses. Respondent is awarded all interest in
the business known as "2 the Rescue" free and clear of
any interest by Petitioner and Respondent shall pay
any and all debt owing on that business and hold the
Petitioner harmless therefrom. Petitioner is awarded
all interest in the business known as "Leishman
Drywall Co., Inc." free and clear of any interest

¹ It was testified, without contradiction, that his response to the proposal was
"it will be a cold day in Hell before I write monthly checks to [Ms. Leishman]."

1 therein by Respondent and Petitioner shall pay any and
2 all debt owing on that business and hold the
3 Respondent harmless therefrom. Petitioner shall
4 pledge the shares in Leishman Drywall Co., Inc. as
5 security for the payment of the Equalizing Judgment
6 referred to in paragraph 9 above and the shares shall
7 be physically within the offices of Ralph Bradley
8 until the Equalizing Judgment is paid in full.

9 Ms. Leishman filed a petition for relief under Chapter 13 of
10 the Bankruptcy Code on September 28, 2000 (District of Oregon Case No.
11 600-65687-aer13). Schedule B accompanying her petition, at Item 17
12 ("Other Liquidated Debts Owing Debtor") described a judgment as an
13 "equalizing judgment against ex-husband, Lane County Case No. 15-97-
14 10106, current balance of \$35,000 plus interest." The current market
15 value of the asset was given as \$2,500. Ms. Leishman's bankruptcy
16 attorney testified at the hearing that he arrived at the value taking
17 into account the difficulty in collecting the judgment, and the limited
18 "market" for selling the judgment, which he believed to be limited as a
19 practical matter to the two parties. Only a \$400 catch-all exemption was
20 claimed.

21 Ms. Leishman's plan of reorganization was confirmed and,
22 roughly five years later, she received her discharge.

23 There were no efforts to collect the judgment during the
24 pendency of the reorganization. Ms. Leishman testified that her then
25 attorneys counseled her that Mr. Leishman was "under ground" and that
26 collection efforts would be fruitless. She did, however, hit pay dirt
27 about two months after receiving her discharge: a writ of garnishment
28 served on Mr. Leishman's bank yielded roughly \$16,000.

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1 The payment history on the obligation claimed by Ms. Leishman
2 is set out in her Exhibit 5 and may be summarized as follows:

<u>Date</u>	<u>Amount</u>
3/1/99	\$9,380
6/1/99	\$4,000
4/11/05	\$15,602.93

7 This summary makes one change in the exhibit based on the
8 testimony: A \$10,000 credit was actually in the sum of \$9,380, and was
9 received on March 1, 1999. According to Ms. Leishman's calculations,
10 the current balance due is \$50,609.38.

11 Paragraph 13 of the judgment of dissolution provided that Mr.
12 Leishman's shares in a family corporation, awarded to him by the
13 judgment, would be held as security for payment of the money judgment.
14 When scheduled payments were not made, the shares were surrendered,
15 together with a flat-bed truck (valued by Ms. Leishman at \$2,500) and the
16 company's accounts receivable. No evidence was presented as to the value
17 of these accounts. It appears that, prior to the time the shares were
18 turned over, Mr. Leishman commenced a "winding down" of the company (his
19 words), to the point that it was virtually inactive at the time the
20 shares were delivered. He maintains that there was substantial "good
21 will" in the company, but presented no evidence as to the value thereof.

ISSUES

23 Ms. Leishman has filed a proof of claim in the amount of
24 \$50,609.38. She claims that the claim should be viewed as in the nature
25 of spousal support, and accorded priority status under Code § 507.

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1 Mr. Leishman objects to the claim on the following grounds:

2 A. The claim is in the nature of a property division, and not
3 spousal support;

4 B. Having claimed in her own bankruptcy that the judgment is
5 worth only \$2,500, and is not in the nature of support, Ms. Leishman is
6 judicially estopped from claiming otherwise in this proceeding.

7 DISCUSSION

8 A. The Claim is in the Nature of Spousal Support.

9 A determination of whether an obligation is in the nature of
10 support is a matter of federal, not state, law. In re Gibson, 103 B.R.
11 218 (BAP 9th Cir. 1989). "In determining whether an obligation is
12 intended for support of a former spouse, the court must look beyond the
13 language of the decree to the intent of the parties and to the substance
14 of the obligation." Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir.
15 1984). The nature of the obligation should be determined in light of the
16 circumstances in existence at the time the parties entered into the
17 agreement. In re Combs, 101 B.R. 609, 615 (BAP 9th Cir. 1989).

18 The Shaver court, 736 F.2d at 1316, listed a number of factors
19 a court may consider in determining the nature of the obligation:

20 1. "[I]f an agreement fails to provide explicitly for spousal
21 support, a court may presume that a so-called 'property settlement' is
22 intended for support when the circumstances of the case indicate that the
23 recipient spouse needs support."

24 The agreement between the Leishmans provides that neither party
25 will pay spousal support - not surprising given Mr. Leishman's stated

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1 aversion to traditional monthly alimony - but that an equalizing judgment
2 "in lieu of spousal support" will be awarded to Ms. Leishman. It is
3 clear that the exclusion of spousal support in paragraph 8 refers only to
4 a regime of monthly payments, and that the lump sum was intended for Mrs.
5 Leishman's support.

6 2. Factor two is whether the facts indicate that support is
7 necessary, such as "the presence of minor children and an imbalance in
8 the relative income of the parties."

9 The "equalizing judgment" awarded to Ms. Leishman provides that
10 it is based on the long-term marriage of the parties, the current earning
11 disparities of the parties, and the differential in income production of
12 the assets awarded. In other words, the award was based on Ms.
13 Leishman's current need for support.

14 3. Factor three: "[I]f an obligation terminates on the death or
15 remarriage of the recipient spouse, a court may be inclined to classify
16 the agreement as one for support."

17 The award was payable in full approximately six months after
18 the effective date of the judgment. By its terms, the obligation to pay
19 does not terminate by the death or remarriage of Ms. Leishman.

20 4. Factor four: looks to the nature and duration of the
21 obligation. Support payments are "generally made directly to the
22 recipient spouse and are paid in instalments over a substantial period of
23 time."

24 The award is payable in monthly instalments for the first six
25 months, with a lump sum of the balance then due.

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1 While the terms of the obligation do not conform to the
2 traditional idea of alimony, spousal support may, however, be awarded for
3 a limited duration - perhaps more so now than in 1984 when the Shaver
4 opinion was written. In addition, there are many reasons that an award
5 in the nature of support may be characterized as other than alimony -
6 e.g. differences in tax treatment, that fact that alimony may be subject
7 to modification based on future need, or that the obligation to pay
8 alimony may be ended after ten years in certain circumstances. ORS
9 107.407. Given the fact that the award was made "in lieu of spousal
10 support,"² and by its own terms was based on Ms. Leishman's need for
11 support, I find that the obligation is in the nature of support.

12 B. Judicial Estoppel Not Applicable.

13 "Judicial estoppel is a flexible equitable doctrine that
14 encompasses a variety of abuses, one form of which is preclusion of
15 inconsistent positions that estops a party from gaining an advantage by
16 taking one position and then seeking another advantage from an
17 inconsistent position." Cheng v. K & S Diversified Investments, Inc.(In
18 re Cheng), 308 B.R. 448, 452 (BAP 9th Cir. 2004)(internal citations
19 omitted).

20 There are three general approaches to judicial
21 estoppel: (1) requiring (like equitable estoppel) that
22 the party injured by the changed position have relied
23 on the first position, (2) merely requiring that the
24 court have relied on, i.e. accepted, the earlier
25 position; and (3) encompassing unseemly adversary
26 behavior that constitutes 'playing fast and loose'
with the court.

² Note that "in lieu of" means in place of, but not "instead of."

1 Id. at 453 (internal citation omitted). The BAP then stated that the
2 second alternative appears to be gaining dominance. Id.

3 The Amount of the Obligation

4 Ms. Leishman, in her earlier bankruptcy, listed the balance due
5 on her judgment at \$35,000 plus interest, but valued it at only \$2,500.
6 While she did obtain a sizable garnishment after her bankruptcy ended,
7 there was no evidence presented that the estimate of value made at the
8 time she filed bankruptcy was not accurate given the facts then known, or
9 was otherwise made with the intent to mislead the court or other parties
10 in interest. It is not inconsistent to value an asset in a debtor's own
11 schedules at less than the "book" value of the asset and later, when
12 filing a proof of claim, to assert the total amount owing. In fact, that
13 is precisely what one may be directed to do.

14 The Nature of the Obligation

15 In her own bankruptcy, Ms. Leishman characterized the
16 obligation as an equalizing judgment, as it was nominally depicted in the
17 judgment of dissolution. As an equalizing judgment is not subject to a
18 specific exemption under Oregon law, only the \$400 "wild card" exemption
19 was claimed against it. \$2,100 of its value was included in the
20 calculation of the "Best Interest of Creditors" test at Code
21 § 1325(a)(4), used to calculate the minimum payment which must be made to
22 unsecured creditors in a Chapter 13 bankruptcy. Had the obligation been
23 characterized as support, it would arguably have been wholly exempt under

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1 the support exemption³, ORS 18.345(1)(i), and no part of its value would
2 have been included in the "Best Interest of Creditors" test. Even if the
3 obligation had been characterized as support, but no exemption claimed,
4 Ms. Leishman would have been no better off, as the Best Interest of
5 Creditors test would have been unchanged, given her good faith estimate
6 of a \$2,500 value. As Ms. Leishman gained no advantage in claiming the
7 obligation as an equalizing judgment in her previous bankruptcy, the
8 bankruptcy court in that case did not rely on her characterization of the
9 obligation in confirming her plan of reorganization. Judicial estoppel
10 will not be applied in this case to require that the obligation be
11 characterized as other than support.

12 CONCLUSION

13 For the reasons given above, I will not invoke judicial
14 estoppel in this case to require that the claim filed by Mary Leishman be
15 characterized as other than support in the amount claimed. Debtor's
16 objection to the claim of Ms. Leishman is denied. Counsel for Ms.
17 Leishman shall file a form of order in accordance with this Memorandum
18 Opinion.

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20 FRANK R. ALLEY, III
21 Bankruptcy Judge

22 ³ ORS 18.345(1)(i) provides that "Spousal support, child support, or separate
23 maintenance [is exempt from execution] to the extent reasonably necessary for the
24 support of the debtor and any dependent of the debtor." It is unclear whether, under
25 Oregon law, an obligation "in the nature of support," but characterized in a judgment
26 of dissolution as something else, is subject to the support exemption. This court has
found no Oregon case on point. However, spousal support is defined at ORS 107.105(1)(d)
as "an amount of money for a period of time as may be just and equitable for one party
to contribute to the other, in gross or in installments or both," a definition which
one could argue entitles the recipient to claim the support exemption if the award is
based on the factors used to determine a need for support.